

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 9

COMPREHENSIVE POST-ACUTE NETWORK, LTD.

and

Case 09-CA-213162

CHARLETTE VIOLE SMITH, AN INDIVIDUAL

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF**  
**TO THE**  
**ADMINISTRATIVE LAW JUDGE**

**I. INTRODUCTION:**

This case is before Administrative Law Judge Andrew Gollin upon the General Counsel's complaint alleging that Respondent violated Section 8(a)(1) of the Act by: threatening an employee with discipline, discharge or other unspecified reprisals if the employee threatened to contact the National Labor Relations Board; suspending an employee in retaliation for threatening to contact the National Labor Relations Board; transferring an employee to another position and imposing additional productivity reporting requirements; and discharging an employee for threatening to contact the National Labor Relations Board. It is also alleged that the suspension, transfer to another position and imposing additional productivity reporting requirements, and the discharge are also violative of Section 8(a)(1) and (4) of the Act. The record evidence convincingly supports the General Counsel's legal arguments.

**II. STATEMENT OF THE CASE:**

The original charge involving the above-captioned case was filed on January 17, 2018 <sup>1/</sup> (G.C. Ex. 1(a)) <sup>2/</sup> and amended on January 24, 2018. (G.C. Ex. 1(c)) On March 20, 2018, the

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<sup>1/</sup> All dates referred to herein are in 2017, unless otherwise noted.

<sup>2/</sup> References to the transcript will be designated as (Tr. \_\_\_\_); General Counsel's Exhibits will be designated as (G.C. Ex. \_\_\_\_); Respondent's Exhibits will be designated as (Resp. Ex. \_\_\_\_ ) and Joint Exhibits will be designated (Jt. Ex. \_\_\_\_)

Charging Party filed a second amended charge. (G.C. Ex. 1(e)) An unfair labor practice hearing was held in Cincinnati, Ohio on August 1, 2018. Based on the evidence adduced at the hearing, General Counsel maintains the following issues are presented for determination.

### **III. ISSUES:**

1. Whether Respondent threatened an employee with discharge because the employee asserted her right to contact the National Labor Relations Board, in violation of Section 8(a)(1) and 8(a)(4) of the Act.

2. Whether Respondent threatened an employee that she could be discharged for asserting her right to go to the National Labor Relations Board and telling the employee she was being suspended for threatening to contact the National Labor Relations Board, in violation of Section 8(a)(1) and 8(a)(4) of the Act.

3. Whether Respondent threatened an employee in retaliation for the employee's protected activity by telling the employee that she would be discharged if the employee "said anything" in violation of Section 8(a)(1) and 8(a)(4) of the Act.

4. Whether Respondent suspended Charlette Vicole Smith in retaliation for asserting her right to contact the National Labor Relations Board, in violation of Sections 8(a)(1) and 8(a)(4) of the Act.

5. Whether Respondent transferred Charlette Vicole Smith to a different position and imposed additional productivity reporting requirements not required of others in retaliation for asserting her right to contact the National Labor Relations Board, in violation of Section 8(a)(1) and 8(a)(4) of the Act.

6. Whether Respondent discharged Charlette Vicole Smith in retaliation for asserting her right to contact the National Labor Relations Board, in violation of Section 8(a)(1) and 8(a)(4) and of the Act.

#### **IV. BACKGROUND:**

Respondent, Comprehensive Post-Acute Network, Ltd., is engaged in the provision of case management services to skilled nursing facilities, including precertifications of patients for nursing facilities. (Tr. 39; G.C. Ex. 1(g))

Respondent publishes and maintains an employee handbook which sets forth an attendance policy, PTO Pay policy (Paid Time Off), employee work rules and a Code of Conduct which discusses progressive discipline and other forms of corrective action. (Resp. Ex. 2, pp. 7, 10, 11-15, 17-18)

Charging Party Charlette Vicole Smith had been employed by Respondent as a network coordinator's assistant/final biller since about March 28, 2016. (Tr. 36, 211; Jt. Ex. 1)

Respondent provided its full time and part-time employees certain benefits including PTO pay (Tr. 39, 204, 278; Resp. Ex. 2, p. 10) The policy sets out that PTO takes the place of sick, absence, and personal time. All time away from work should be deducted from the employee's PTO bank in a minimum of 4-hour increments with the exception of fixed [Respondent] holidays, and time off in accordance with [Respondent's] policy for vacation, jury duty and bereavement. (Tr. 204, 210, 302) Full-time employees are eligible for 64 PTO hours per year. These hours are accrued on the last day of each quarter – March 31, June 30, September 30, and December 31. (Tr. 39; Resp. Ex. 2, p. 10)

About August 30, Smith reported to work but left early due to illness. (Tr. 40) She called off work on August 31 and September 1. (Tr. 41-42) Smith also visited a doctor during this

illness who advised her to remain off work until September 5. (Tr. 42) Director of Network Services Kimberly Davis had already told Smith that she would not be paid PTO for her September 1 absence. (Tr. 43) Then, about October 2, Smith called off work again. (Tr. 43) Smith returned to work on October 3. (Tr. 43) There was no discussion with anyone concerning the use of PTO at that time. (Tr. 43) About October 10, Davis approached Smith and told her that she would not receive PTO pay for her October 2 absence. (Tr. 43-44) Smith disputed Respondent's calculations and even told Davis that she was just awarded 2 days at the end of September. (Tr. 44) After reviewing her personal records, about October 11, Smith told Davis that it was not possible that she did not have any PTO days. (Tr. 46) Chief Executive Officer Carol Turni, happened on this meeting between Davis and Smith. (Tr. 46) Turni showed Smith a list of dates that Davis prepared showing all of her absences and the use of PTO days. (Tr. 46-48; 140-141, 279; G.C. Ex. 2) Turni asked Smith to verify this list with her pay check stubs and they would discuss the matter the following day. (Tr. 46) Smith complied and even made notations on the list of dates, acknowledging or disputing the use of PTO days. (Tr. 49-50; G.C. Ex. 2(a)) Smith acknowledges that she found some discrepancies. (Tr. 51-52)

On October 12, Smith met with Davis and Turni concerning her use of PTO days. (Tr. 52-53, 214, 215, 278) They reviewed the list and Smith's pay check stubs. (Tr. 50-54, 215, 279) They could not come to a resolution. (Tr. 55, 280, 281) Smith gathered her pay check stubs and a letter she had prepared pursuant to Turni's instruction as she prepared to return to her office. (Tr. 55, 219) Smith then said, "Well, we're not going to resolve this, so what I'm going to do is, I'm just going to go to the Labor Board with it." (Tr. 55-56, 219, 281, 294; Jt. Ex. 1) Turni responded, "Charlette, I don't think that it's a good idea that you tell your CEO that you are going to go to the Labor Board because you could be terminated for that." (Tr. 56, 142)

Smith returned to her office. (Tr. 56) Between 3 and 5 minutes later, Davis came to Smith's office and told her that Turni would like to speak with her. (Tr. 56, 220) When Smith returned to Turni's office, Turni told Smith that she did not believe that Smith was owed any money but Respondent was going to pay her for October 2, and it was going to give Smith an additional PTO day. (Tr. 57, 220, 282) Smith protested stating that she was only owed 1 day; however, Turni again stated that Respondent would give her 2 additional PTO days.

Then, sometime between November 6 and November 17, Smith reported to work 2 hours late. (Tr. 58) Smith notified Davis at least 2 hours prior to the start of the shift that she would be arriving late. (Tr. 58-59) Smith did not request to use PTO time for this late arrival. (Tr. 59) Subsequently, after receiving her next paycheck, Smith realized that Respondent paid her 4 hours of PTO. (Tr. 59-60) Smith discussed this matter with Davis in the facility's front lobby. (Tr. 61) Smith questioned Davis as to why she paid her 4 PTO hours when she was only late 2 hours. (Tr. 61) Davis responded that was the way Respondent applied the PTO. (Tr. 61) Smith continued to protest this action stating that she wanted to keep her full PTO day intact. (Tr. 61) Again, Davis reiterated that was Respondent's procedure. (Tr. 62)

Between November 27 and December 1, Smith approached Davis in the "war room" and told Davis that she had been thinking about how they could resolve this latest PTO incident. (Tr. 63) Smith offered to take 2 hours off to compensate for the additional 2 hours that Respondent had deducted when she reported to work late. (Tr. 63) Davis responded that Respondent could not do that because Respondent's procedure was to pay or use PTO in 4-hour increments. (Tr. 63-64) Smith also asked if Davis was saying that if an employee who reported to work 15 minutes late that Respondent would pay the employee 4 PTO hours. (Tr. 64) Davis responded affirmatively. (Tr. 64)

Later that same day Smith attempted to discuss the matter with Turni. However, Turni replied that she was busy, but they could discuss the matter when Turni returned to the facility. (Tr. 64-65, 282) They did not discuss the matter that day. (Tr. 65, 282)

Then about December 13, when Smith deposited some charts in Davis' in-box, Davis told Smith that she had discussed the 2 hours of PTO time with Turni and Turni agreed to allow Smith to leave work 2 hours early. (Tr. 67) Davis permitted Smith to leave work 2 hours early the following day. (Tr. 67) When Smith reported to work on December 15, she went to Davis' office and told Davis that she wanted to make sure they were on the same page with respect to the 2 PTO hours. Smith told Davis that she wanted to verify that the 2 hours would not be deducted from her next pay check. (Tr. 69) Davis responded that was not how it works that Respondent had already paid her for the 2 hours. (Tr. 69) When Smith reviewed her pay check stub on December 20, she approached Davis and proclaimed that she was not supposed to deduct the 2 hours. (Tr. 71-72) Davis did not respond and she walked away.

The following day, Smith sent an email to Turni about the matter. (Tr. 72; G.C. Ex. 3) Davis stated her position with respect to being allowed to take off work for 2 hours. (Tr. 72-73; G.C. Ex. 3) She also requested to discuss this matter with Turni. Turni responded that they could discuss the issue the following day. (G.C. Ex. 3) Turni approached Smith towards the end of the day and asked if Smith wanted to discuss this matter that day or if she could wait until after the holidays. (Tr. 74, 282) Smith agreed that they could discuss the issue after the holidays.

About January 2, 2018, at about 10:15 a.m., Davis asked Smith to go to Turni's office so they could discuss the 4 PTO hours. (Tr. 77, 249) Smith accompanied Davis to Turni's office. (Tr. 78, 250)

Once in the office, Turni explained that Respondent was not required to give Smith PTO time and that it was essentially a gift from Respondent. (Tr. 78) Again, Davis, Smith, and Turni discussed how Respondent's PTO system was applied. (Tr. 78; 223, 250, 284) Smith again disagreed with Respondent's PTO procedures. (Tr. 224, 250, 284, 286) Turni and Davis both agreed that Respondent administered the PTO pay in 4-hour increments. (Tr. 78, 224, 225) Smith then told Turni and Davis not to worry about it because she did not want to argue over 2 hours and they would leave it at that. (Tr. 49) Smith continued stating that she could not believe that Respondent would give someone 4 hours of PTO if an employee reported to work 15 minutes late. (Tr. 78-79, 224) Smith stood up, grabbed her pay check stub and said, "Well, I don't know, but I know that if I come in late 15 minutes and you give me 4 hours of PTO, then we're going to see what happens." (Tr. 79, 225, 250-251, 286) Smith then returned to her office. (Tr. 79, 225, 251, 287) Between 3 and 5 minutes later, Davis again came to Smith's work area and told her that Turni wanted to speak with her again. (Tr. 79-80, 226-227, 251, 280, 297) Smith followed Davis back to Turni's office. (Tr. 80, 227, 252, 297) Smith began the conversation by again saying that she did not believe that employees are being given 4 hours of PTO time when they are 15 minutes late. (Tr. 80, 177) Turni reiterated that this was Respondent's procedure. (Tr. 80, 177) Smith proclaimed that she did not believe that everyone was being treated that way. (Tr. 80, 177) Turni then told Smith that Smith had just come in there and threatened them. (Tr. 81, 226, 297, 299, 305) Smith responded, "I never threatened anyone. Carol, you and I have already talked about the fact that I will go the Labor Board." (Tr. 81, 177, 299) Turni then said, "Charlette, I've told you about coming in here threatening to go to the Labor Board. I told you the last time I was going to terminate you. But I'm not going to terminate you. This is what I am going to do. I'm going to suspend you. You're suspended

for 3 days. Come back on Monday.” Smith said okay and returned to her office to gather her personal effects. (Tr. 81-82, 177, 226)

Davis and Turni followed Smith as she exited the building. Davis asked for Smith’s key fob to Respondent’s electronic entrance system. (Tr. 82, 157, 288) Smith turned and asked whether she was suspended or “fired.” (Tr. 82) Turni intervened, confirmed the suspension and instructed Smith to return on Monday. (Tr. 82)

About January 8, 2018, Smith returned to work from a 3-day suspension. (Tr. 83, 233) Upon her return, Smith realized that her key fob had been deactivated. (Tr. 83, 159) After gaining entry into the building, Smith immediately went to Davis’ office and reported her return to work as well as the fact that she did not have access to the building. (Tr. 84) Thereafter, Smith went to her office to find that many of her files had been removed. (Tr. 84-86, 159) Smith began working on the files that were on her desk. (Tr. 86) A few minutes later, Davis came to Smith’s office and instructed her to begin working on the files that were on her desk. (Tr. 86-87) Davis also informed Smith that she would no longer be performing the billing work and that she would have further discussions with her when Turni arrived. (Tr. 87, 235)

At approximately 10:15 a.m., on January 8, 2018, Davis again approached Smith at her desk and instructed Smith to go to Turni’s office. (Tr. 87) After Davis and Smith arrived at Turni’s office, Turni leaned over her desk, pointed a finger at Smith and told her that she did not want to hear another word from her. Turni also told Smith that if she was insubordinate in any way, she would be terminated. (Tr. 88, 174, 245, 291)

Turni then stated this was Smith’s final warning. (Tr. 88) Turni asked Smith if she understood. Smith responded affirmatively. (Tr. 88)



At that point, Davis again told Smith that she would no longer be performing billing. (Tr. 88-89) Smith followed Davis to the “Humana” room where Davis told Smith that from now on she would be obtaining discharge information for the Humana files. (Tr. 89) The following morning, Smith opened an email from Davis with instructions on how to perform her tasks, giving her a daily quota for the number of files to complete, and attaching a productivity log. (Tr. 90-91; G.C. Ex. 4)

Later in the day, Davis approached Smith and admonished her for not completing her assignment of closing out 60 accounts. (Tr. 93) Smith responded that she had called 60 facilities but was waiting on return calls from some of the facilities. (Tr. 94) Davis threatened to send Smith another email with her instructions which might make Smith better able to understand Davis’ expectations. (Tr. 94) Smith responded that would be fine if Davis wanted to email her again. (Tr. 94)

Later that afternoon, Davis sent Smith another email acknowledging the accounts that Smith closed but stating essentially that the job was incomplete. (Tr. 95; G.C. Ex. 5) Smith did not see this email until the next day. Thereafter, Smith questioned Clara Eisnaugle, who had been performing the Humana tasks as to whether she was required to keep a log. (Tr. 99) Eisnaugle responded that she never had to log anything. (Tr. 99)

Then on January 12, 2018, Smith called off work due to illness. (Tr. 99-100, 127, 150, 161-162, 241-242, 272) Smith returned to work on Monday, January 15, 2018. (Tr. 100, 242) Davis approached Smith at her desk and presented her with a Disciplinary Action Form that Smith refused to sign, stating that she had spoken to her attorney about it. (Tr. 100-102, 163-165, 242) Smith worked the remainder of the day without incident. (Tr. 103)

On January 16, 2018, Smith reported back to work. (Tr. 103, 163) Davis told Smith to bring all of her logs to her. (Tr. 104) At the end of the day, Davis told Smith that Turni wanted to talk to her. (Tr. 106) While following Davis to Turni's office, Smith stopped in the restroom, turned on the recorder on her cell phone and then proceeded to Turni's office. (Tr. 106-107) Turni told Smith that she understood that Smith and Davis had a discussion on January 15, 2018 about Smith calling off work the preceding Friday (January 12, 2018). Turni claimed that Smith was rude to Davis. (Tr. 107, 291-292, 304) Smith protested, stating that she was not rude; that she refused to sign a Disciplinary Action Form. (Tr. 107; G.C. Exs. 6 and 7) Turni stated there were witnesses. (Tr. 107) Smith denied that there were any witnesses. (Tr. 107; G.C. Exs. 6 and 7) Turni also told Smith that the last time she brought Smith in the office that if there was any type of insubordination, Smith would lose her job. This comment was a result of the January 2, 2018 "threat" that Smith made in connection with asserting her right to contact the Labor Board. Turni then discharged Smith. (Tr. 107-108; G.C. Exs. 6 and 7)

**V. BACKGROUND PROTECTED CONCERTED ACTIVITY  
AND UNLAWFUL DISCIPLINE:**

About July 13, 2016, Smith participated in a disciplinary meeting with Davis involving Respondent's call-off procedure and the use of PTO days. (Tr. 260-261) Thereafter, she discussed her disciplinary meeting with fellow employees regarding how Respondent calculated and applied PTO days. (Tr. 214, 260-261) About July 14, 2016, Respondent issued Smith another disciplinary action for discussing her initial disciplinary meeting (July 13, 2016) with fellow employees. (Tr. 24, 260-261; Resp. Ex. 1, p. 28)

## **VI. CREDIBILITY:**

### **A. Smith Should be Credited Over Respondent's Witnesses:**

An Administrative Law Judge is empowered to evaluate the credibility of witnesses and credit or discredit their testimony. Significant weight is given to an Administrative Law Judge's credibility determinations because the Judge physically sees and hears witnesses when they testify. Witnesses' demeanor, including their expressions, physical posture and appearance, manner of speech, and non-verbal communication, may convince the Administrative Law Judge that the witness is testifying truthfully or falsely. Credibility determinations may furthermore be based on the weight of the respective evidence (established or admitted), inherent probabilities, and reasonable inferences, which may be drawn from the record as a whole. See, *Medeco Security Locks*, 322 NLRB 665 (1996); *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996); *V&W Castings*, 231 NLRB 912, 913 (1977), *enfd.* 387 F.2d 1006 (9<sup>th</sup> Cir. 1978)

Based on an application of these principles, Smith's testimony should be credited over that of Respondent's witnesses. Smith testified consistently with regard to any event to which she had personal knowledge. She recalled specific foundational information about the various conversations and meetings, answering each question on direct examination with clear and confident answers. The credibility of Smith's testimony, including her account about her discharge meeting is supported by documentary evidence. (Tr. 107; G.C. Exs. 6 and 7) Even when minor facts which initially appeared to be inconsistent were discussed at the hearing, Smith maintained a steady and composed demeanor and explained the consistency of the facts. Smith also did not waver on cross-examination. On both direct and cross-examination, Smith testified with certitude, consistency, and detail.

By stark contrast, Davis and Turni provided numerous contradictory, vague, and inconsistent responses to questioning by the General Counsel. For example, although Davis and Turni both testified at the hearing that in their January 2, 2018 meeting, Smith did not deny threatening them or attempt to explain her comment. However, on cross examination and after reviewing her affidavit to the Board, Turni admitted that Smith denied that she threatened them and Smith stated that Turni knew what she meant. (Tr. 36-37)

Both Davis and Turni also failed to provide specific information in response to basic questions. For example, they both claim that they could not remember the specifics of certain conversations and did not know “exact dates and times” because there had been a lot “going on.”

In view of the consistent and detailed nature of Smith’s testimony and the inconsistent and vague nature of Respondent’s witnesses testimony, the General Counsel respectfully requests that the Administrative Law Judge credit Smith’s testimony to the extent the witnesses’ versions of events differ.

## **VII. THE UNFAIR LABOR PRACTICES:**

### **A. TURNI’S THREATS TO DISCHARGE**

Respondent’s witness Kimberly Davis testified that as early as July 16, 2016, Smith complained and questioned Respondent’s calculations and application of its PTO days. (Tr. 214, 260-261) Smith even discussed this matter with fellow employees and was unlawfully disciplined for doing so. (Tr. 214, 260-261; Resp. Ex. 1, p. 28) <sup>3/</sup> Subsequently, Smith continues to complain about the calculation and application of PTO time. (Tr. 46, 49-50, 61-64, 280-282)

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<sup>3/</sup> Although discovered during the trial, this matter is outside of the Board’s statutory time limits under Section 10(b) of the Act.

About October 11 and 12, the issue came to a head, Davis and Turni met with Smith and discussed Smith's accrued and used PTO days. (Tr. 46-51, 214-215, 279, 282) They repeatedly went through a list of dates that Davis and Turni provided Smith. (Tr. 46-51, 214-215, 279) After acknowledging that they were not going to resolve the issue, Smith decried, ". . . so what I'm going to do is, I'm just going to go to the Labor Board with it." (Tr. 55-56, 219, 281, 294; Jt. Ex. 1) Smith credibly testified that Turni responded, "Charlette, I don't think that it's a good idea that you tell your CEO that you are going to go to the Labor Board because you could be terminated for that." (Tr. 58) Respondent would have you believe that Turni told Smith that she had every right to go to the Labor Board. Turni claims that she told Smith that it was her decision to take it to the labor board. (Tr. 281) Davis also incredibly testified that Turni says, "Charlette, you're entitled to speak with whomever you want . . . that's your right." Comments such as this are counter intuitive. What employer proclaims that an employee has the right to go to the Labor Board?

It is well established that an employee need not specifically reference the National Labor Relations Board in order for a statement by an employee about contacting the Board or Labor Department to be protected under the Act. *BMC, America*, 304 NLRB 362 (1991); *Goeman America, Inc.*, 314 NLRB 504 (1994); *Overseas Motors, Inc.*, 260 NLRB 810 (1982); *Book Covers, Inc.*, 276 NLRB 1488 (1985).

In *Red Devil Auto Fleet Repairs, LLC*, ALJD(SF) 04-16 (February 3, 2016), where an employee threatened to take a group complaint of delayed paychecks to the Labor Board, the Administrative Law Judge held that the employee's reference to seeking assistance from the Labor Board is sufficient to bring such statement within the broad protections of Section 8(a)(4).

The Administrative Law Judge, in citing *Goeman America*, supra, stated that it is generally known that the Labor Board is the agency to which workers take their complaints. *Id.* at 16, ll. 1-2.

The instant case is analogous to *BMC America, Inc.*, supra, where employees who were upset about the sale of its employer and the announced discontinuance of its seniority and pension in contravention to contract language, announced they were going to the Labor Department. Several employees left the plant to go to the National Labor Relations Board's Regional Office. However, another employee who agreed to go was missing from the group. When the leader of the group returned for the missing employee, a supervisor asked the "missing" employee where he was going. The employee responded "with the others." The supervisor told the employee if he left that both he and his wife would be discharged. The National Labor Relations Board, in reversing the Administrative Law Judge, found the employer violated 8(a)(1) of the Act by threatening an employee and his wife with discharge if he joined the group.

Counsel for the General Counsel submits that Turni's threat to Smith that she should not tell her CEO that she was going to the Labor Board because it could result in her discharge, is a violation of the Act.

**B. SUSPENSION OF CHARLETTE VIOLE SMITH  
AND SUBSEQUENT THREAT:**

About January 2, 2018, Turni finally met again with Smith to discuss a matter involving the calculations and application of PTO time. (Tr. 77, 249) Davis was also present. (Tr. 78, 250) Again, they engaged in a protracted discussion about the PTO hours assessed to Smith when she reported 2 hours late to work in October 2017. (Tr. 78, 223, 250, 284) Davis and Turni were frustrated because Smith still did not understand their explanation of how and when PTO was

applied even though this was at least the third major conversation they had about the matter since July 2016. Smith, too, was frustrated because neither Davis nor Turni seemed to understand her position.

Davis and Turni determined not to placate Smith on this occasion. Smith finally stated that if she arrived at work 15 minutes late and they deducted 4 hours from her PTO bank (applied 4 hours of PTO time), “they would see what would happen.” (Tr. 79, 153, 225, 285) Smith purposely did not say that she was going to the Labor Board as a result of the October 12 meeting with Turni and Davis wherein Turni told her that she should not tell her CEO that she was going to the Labor Board because she could be fired for that. (Tr. 77, 81, 142) Smith credibly testified as to why she did not again use the words “labor board.” (Tr. 81, 153-154) It is clear that Smith consciously and carefully chose the words that she used during that meeting. When accused of threatening Davis and Turni, Smith (without hesitation) denied threatening them and even told them what she meant, that they had discussed it before, and she did not use the words “Labor Board.” (Tr. 81)

Even after her credible explanation, Respondent seized upon the opportunity and suspended Smith to teach her a lesson. Counsel for the General Counsel submits that both Davis and Turni were disingenuous in their faulty recollections of all that transpired that day. Further, they were even more disingenuous when they testified that they feared Smith because they had been threatened. (Tr. 225-226, 251, 287) The only “threat” that Smith ever made was one to assert her lawful rights. In this regard, the record disclosed that neither Davis nor Turni reported this “threat” to the police. (Tr. 252, 300)

In assessing whether an employer discriminated against an employee in violation of Section 8(a)(1) and (4) of the Act, the Board does not require that an employee actually file a

charge and has instead found that the retaliation against an employee for contemplating Board action violates Section 8(a)(4). See, *Hoover Design Corp.*, 167 NLRB 461 (1967).

Here, admittedly on October 12, Smith asserted her right to contact the Labor Board to resolve the issue involving the PTO policy. Subsequently, she had two additional incidents involving PTO time. She was unable to discuss this matter with Turni until January 2, 2018. After failing to come to a resolution, Smith discussed a hypothetical situation and then stated if 4 PTO hours were paid for her being 15 minutes late, they would see what happened, clearly implying Board action. Respondent, in turn, suspended Smith.

Upon Smith's return from suspension, Turni, who was apparently frustrated and agitated over Smith's continued complaints about the PTO policy and her threats to go to the Labor Board over the matter, met with Smith and threatened that if she heard another word that she would terminate Smith. Clearly, Turni was upset about these repeated complaints about the PTO policy and the accompanying threats to go to the Labor Board.

In analyzing whether an employee is suspended or discharged under Section 8(a)(4) of the Act, the Board applies the test set out in *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds, 662 F.2d 899 (1<sup>st</sup> Cir. 1981), cert denied, 455 US 989 (1982). Counsel for the General Counsel asserts that with respect to the January 2, 2018 suspension that clearly Respondent had a hostility or animus toward protected concerted activities, to wit, the July 2016 disciplinary action issued to Smith for discussing an earlier disciplinary action as well as discussing Respondent's PTO policy with fellow employees. Additionally, Turni's October 12, threat that mentioning the Labor Board could result in Smith's termination are both evidence of animus or hostility towards Smith's protected activity. Admittedly, the Employer had knowledge of both incidents of protected concerted activity. (Tr. 214, 219, 260-261, 281; Jt. Ex. 1; Resp. Ex. 1, p. 28)



Counsel for the General Counsel asserts these incidents and Smith's January 2, 2018 veiled threat to "see what happens" all contributed to Respondent's decision to suspend Smith.

Counsel for the General Counsel submits that Respondent violated Sections 8(a)(1) and 8(a)(4) when it suspended Smith on January 2, 2018. Counsel for the General Counsel further submits that Respondent again violated the Act on January 8, 2018, upon Smith's return from suspension, when Turni told her that if she heard another word from Smith, that Smith would be discharged.

**C. CHANGE IN CHARLETTE VIOLE SMITH'S  
WORKING CONDITIONS:**

Upon Smith's return from suspension, Davis informed her that her duties were changed. (Tr. 87-89, 233) Smith had performed the same job throughout her employment up until this point. (Tr. 211) Respondent presented no evidence that it had ever disciplined Smith because of her work performance. Davis testified that in December 2017, she met with Smith to discuss Smith's job performance. Smith acknowledged it was not a write up. However, Counsel for the General Counsel contends that again Davis was disingenuous with this testimony. On cross examination, Davis admitted that she brought all of the members on her administrative team in to determine where they were at and where they needed to be because Respondent was approaching its busy season. (Tr. 262-263)

Davis also testified that when Smith was suspended, Clara Eisnaugle performed Smith's tasks. Both Davis and Turni inferred that the back log of cases in Smith's office resulted in delayed billing to Respondent's customers. (Tr. 230-233) However, neither Davis nor Turni cited any instance where a customer complained about a delay in being paid. In this regard, Turni testified that when Respondent has delayed providing billing information to customers, which prevents them from being paid, they would complain. (Tr. 232) One would be hard

pressed to believe that Davis was not aware of the back log of files in Smith's office prior to January 2, 2018.

Counsel for the General Counsel submits that this change in duties was to teach Smith a lesson. Respondent assigned Smith to do a job that was sporadically performed because they did not have a permanent employee assigned to perform the "Humana" tasks. The employee assigned to those tasks was a PRN (as needed employee). (Tr. 235) In addition, Respondent trained Eisnaugle, a new employee, to perform the Humana tasks. (Tr. 266, 315, 319-320)

Further, after assigning Smith to perform the "Humanas," Davis also added a productivity log to the tasks. Eisnaugle testified that she did not have to keep a productivity log when she performed that job. (Tr. 320) Smith had never utilized a productivity log in her previous duties. (Tr. 272)

Counsel for the General Counsel submits that the January 8, 2018 change in Smith's position and the imposition of the productivity log was instituted by Respondent in retaliation for Smith's continued assertion of her right to contact the Labor Board in violation of Section 8(a)(1) and (4) of the Act.

#### **D. JANUARY 16, 2018 DISCHARGE OF CHARLETTE VIOLE SMITH:**

On January 12, 2018, Smith called off work. (Tr. 99-100, 150, 161, 241-242) She returned to work on January 15, 2018. (Tr. 100, 242) Davis was determined to discipline Smith for a violation of the attendance policy. (Resp. Ex. 2, p. 37) When Davis approached Smith with the Disciplinary Action Form, Smith protested, stating that she called off work due to illness and she refused to sign the form. (Tr. 100-102, 242) Smith asserted that she was using one of her recently accrued PTO days for this absence. Smith even suggested that Davis review Respondent's handbook (Tr. 101; Resp. Ex. 2, p. 10) wherein it states that PTO can be used for

sickness or illness. (Tr. 101) Smith attempted to reason with Davis, stating that she could not schedule when she would be sick. (Tr. 101-102) Smith stated that she had discussed this with her attorney and she did not have to sign the Disciplinary Action Form. (Tr. 102) Smith worked the remainder of the day without incident. (Tr. 103)

Upon Smith's return to work the following day, Davis and Turni met with her. Turni told Smith that, according to witnesses, Smith had been insubordinate with Davis. (G.C. Exs. 6 and 7) Smith denied that there were any witnesses and explained that she simply refused to sign the write-up because she had a PTO day. (Tr. 107; G.C. Ex. 6 and 7) Turni then said, "But your tone and how you talked to Kim was insubordinate." Finally, Turni told Smith that at that point [Respondent] was going to go its separate way with her. (Tr. 108; G.C. Exs. 6 and 7)

Respondent presented a witness, Margueritte Williams, who was Smith's office mate at the time. (Tr. 102, 323-324) Williams, pursuant to Turni's request, prepared a statement about the January 15, 2018 incident. (Tr. 292, 329; Resp. Ex. 1, p. 38) Williams was on the telephone performing her work tasks when the brief conversation between Smith and Davis occurred. (Tr. 103)

According to Williams, Smith became loud, causing her to terminate her conversation with a customer. (Tr. 326) However, Williams, when testifying, had no recollection of what Smith or Davis, with any specificity, said in this conversation.

Counsel for the General Counsel contends that once again, Smith angered Davis and Turni when she again was clearly complaining about the PTO policy and its application, including her comment that she had discussed the situation with her attorney. Counsel for the General Counsel submits that Davis and Turni seized upon this opportunity to rid Respondent of an employee who was merely asserting her right to legal redress with the National Labor Relations Board.

Counsel for the General Counsel asserts that but for Smith's protected activity, Respondent would have continued to employ Smith because she was a valued employee.

Although Smith said that she had discussed the situation with her attorney, Respondent clearly saw that as being a continuation of Smith's protected activity to go to the Labor Board.

Counsel for the General Counsel submits that, as with Smith's suspension, change in work position, and the disparate imposition of a productivity log, Respondent terminated Smith to rid itself of an employee because she continuously complained about a matter over which she asserted her right to contact the Labor Board and thus, Respondent violated Section 8(a)(1) and 8(a)(4) of the Act.

## **VIII. CONCLUSION**

Counsel for the General Counsel respectfully urges the Administrative Law Judge find that Respondent violated Section 8(a)(1) and 8(a)(4) of the Act by: threatening Charlette Vicole Smith with discharge because she asserted her right to contact the National Labor Relations Board; telling Charlette Vicole Smith that she was being suspended for asserting her right to contact the National Labor Relations Board; threatening to discharge Charlette Vicole Smith (if she "said anything") in retaliation for her asserting her right to contact the National Labor Relations Board; suspending Charlette Vicole Smith in retaliation for asserting her right to contact the National Labor Relations Board; transferring Charlette Vicole Smith to a different position and imposing additional productivity reporting requirements not required by others; because she asserted her right to contact the National Labor Relations Board; and discharging Charlette Vicole Smith in retaliation for her asserting her right to contact the National Labor Relations Board. Counsel for the General Counsel requests an order requiring Respondent to remove any reference to the suspension and discharge from Charlette Vicole

Smith's personnel file, reinstate her to her former position and pay her for any loss of wages and other benefits she suffered because of her unlawful transfer, suspension, and discharge.

**IX. PROPOSED:**

**A. CONCLUSIONS OF LAW**

1. Respondent has been an Employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. By threatening to discipline, discharge or issue unspecified reprisals to Charlette Vicole Smith, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

3. By suspending Charlette Vicole Smith for asserting her right to contact the National Labor Relations Board, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), 8(a)(4), and Section 2(6) and (7) of the Act.

4. By transferring Charlette Vicole Smith to another position and imposing additional productivity reporting requirements for asserting her right to contact the National Labor Relations Board, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and 8(a)(4) and Section 2(6) and (7) of the Act.

5. By discharging Charlette Vicole Smith for asserting her right to contact the National Labor Relations Board, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and 8(a)(4) and Section 2(6) and (7) of the Act.

**B. PROPOSED FINDINGS:**

Having found that Respondent engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, as I have found that Respondent has violated the Act by

threatening Charlette Vicole Smith with discipline, discharge or other unspecified reprisals on October 12, I shall order it to cease and desist therefrom.

As I have also found that Respondent suspended Charlette Vicole Smith, transferred her to another position and imposed additional productivity requirements and also discharged her, I shall order it to cease and desist therefrom and order it to make Charlette Vicole Smith whole for any loss of earnings and other benefits that resulted from its unlawful actions. Backpay for this violation shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970) enfd 444 F.2d 502 (6<sup>th</sup> Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 117 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Further having found that Respondent unlawfully discharged Charlette Vicole Smith in violation of Sections 8(a)(1) and 8(a)(4) of the Act, I shall also order Respondent to offer full reinstatement to Charlette Vicole Smith or if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any rights and privileges previously enjoyed, and to make her whole for any loss of wages and other benefits she may have suffered as a result of Respondent's unlawful transfer, suspension, and unlawful termination in accordance with *King Soapers, Inc.*, 364 NLRB No. 93 (2016) with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed by *Kentucky River Medical Center*, supra.

In addition, Respondent shall, within 21 days of the date the amount of back pay is fixed either by agreement or Board order, file a report allocating back pay with the Regional Director for Region 9. Respondent will be required to allocate back pay to the appropriate calendar year

only. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner. *Advo Serv of New Jersey, Inc.*, 363 NLRB NO. 143 (2016). Respondent is also ordered to expunge from its files any reference to Charlette Vicole Smith's loss of employment due to the unlawful suspension and unlawful termination and notify her, in writing, that this has been done and that the loss of employment will not be used against her in any way.

I further recommend that Respondent post a notice in the usual manner, including electronically, to the extent mandated in *J. Picini Flooring*, 356 NLRB 11, 15-16 (2010). Also, in accordance with that decision, any questions regarding the appropriateness of a particular type of electronic notice should be resolved at the compliance stage of this proceeding, 356 NLRB at 13.

### **C. PROPOSED ORDER:**

Respondent, Comprehensive Post-Acute Network, Ltd., Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

- (a) Threatening employees with discipline, discharge or unspecified reprisals for asserting her right to contact the National Labor Relations Board.
- (b) Suspending Charlette Vicole Smith for asserting her right to contact the National Labor Relations Board.
- (c) Transferring Charlette Vicole Smith to another position and imposing additional productivity requirements for asserting her right to contact the National Labor Relations Board.

(d) Discharging Charlette Vicole Smith for asserting her right to contact the National Labor Relations Board.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days of the date of this Order, offer Charlette Vicole Smith full reinstatement to her former job (pre-transfer) or, if that job no longer exists, to a substantially equivalent position without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Charlette Vicole Smith whole for any loss of earnings and other benefits suffered as a result of the unlawful transfer, suspension, and discharge, less any net interim earnings.

(c) Compensate Charlette Vicole Smith for any adverse tax consequences of receiving a lump-sum back pay award.

(d) Within 21 days of the date that the amount of back pay is fixed, either by agreement or Board Order, file a report allocating back pay with the Regional Director for Region 9. Respondent will be required to allocate back pay to the appropriate calendar years only. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

(e) Within 14 days, remove from its files any reference to the unlawful transfer, suspension and discharge of Charlette Vicole Smith and, within 3 days thereafter, notify her, in writing, that this has been done and that the unlawful transfer, suspension, and discharge will not be used against her in any way, including in



response to an inquiry from any employer, employment agency, unemployment insurance office, or reference seeker.

- (f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.
- (g) Within 14 days after service by the Region, post at its facility in Fairfield, Ohio copies of the attached notice marked “Appendix A.” Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by Respondent’s authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated: September 6, 2018

Respectfully submitted,

***/s/ Linda B. Finch***

Linda B. Finch  
Counsel for the General Counsel  
Region 9, National Labor Relations Board  
3003 John Weld Peck Federal Building  
550 Main Street  
Cincinnati, Ohio 45202-3271

**D. PROPOSED NOTICE:**

**(Attachment A)**

**(To be printed and posted on official Board notice form)**

**FEDERAL LAW GIVES YOU THE RIGHT TO:**

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

**WE WILL NOT** do anything to prevent you from exercising the above rights.

**WE WILL NOT** threaten you with discipline, discharge, or other unspecified reprisals if you assert your right to contact the National Labor Relations Board.

**WE WILL NOT** suspend, transfer to another position, impose additional productivity reporting requirements, or terminate you for asserting your right to contact the National Labor Relations Board or otherwise participate in a Board proceeding.

**WE WILL NOT** in any like or related manner, interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the Act.

**WE WILL** offer Charlette Vicole Smith immediate and full reinstatement to her former (pre-transfer) job, or if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority and/or privileges previously enjoyed.

**WE WILL** pay Charlette Vicole Smith for the wages and other benefits she lost because we transferred, suspended and discharged her.

**WE WILL** remove from our files all references to the transfer, suspension, and discharge of Charlette Vicole Smith and **WE WILL** notify her, in writing, that this has been done and that the transfer, suspension, and discharge will not be used against her in any way.

**Comprehensive Post-Acute Network Ltd.**

(Employer)

**Dated:** \_\_\_\_\_

**By:** \_\_\_\_\_

(Representative)

(Title)

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*The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).*

550 MAIN ST  
RM 3003  
CINCINNATI, OH 45202-3271

**Telephone:** (513)684-3686  
**Hours of Operation:** 8:30 a.m. to 5 p.m.

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**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

**CERTIFICATE OF SERVICE**

September 6, 2018

I hereby certify that I served the attached Counsel for the General Counsel's Brief to the Administrative Law Judge on all parties by mailing true copies thereof by electronic mail today to the following at the addresses listed below:

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***/s/ Linda B. Finch***

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